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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND RICHARD BENICKI, Defendant and Appellant.	F038214 (Super. Ct. No. 3720) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Tuolumne County. Eleanor Provost, Judge.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stephen G. Herndon and James Ching, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Raymond Benicki was convicted by jury verdict of one felony -- leaving the scene of an accident (Veh. Code, § 20001, subd. (a)) -- and two misdemeanors -- reckless driving causing bodily injury and destruction of evidence. Appellant fled the

scene of an accident, caused by his reckless driving, which resulted in serious injury to the other driver. He thereafter arranged to have his vehicle destroyed.[1] Appellant was sentenced to a total term of four years -- a two-year base term for the felony count, which was doubled for a prior "strike" conviction.

DISCUSSION

I.

The trial court did not err by denying appellant's motion for a new trial on the ground of jury misconduct, nor did the trial court err by failing to conduct an evidentiary hearing or by refusing to release juror identifying information.

A.

The trial court correctly concluded the declaration of Juror X[2] was insufficient to warrant a new trial. Juror X's declaration stated that he "felt the District Attorney failed to prove his case. Specifically I felt the prosecution failed to establish the identity of the driver." Juror X also stated that:

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[1] Witnesses described appellant's vehicle and the unsafe manner in which he drove it moments before the impact with the other vehicle. Although none of the witnesses could identify appellant as the driver, his identity was established by his own admissions to a close friend and the close friend's girlfriend. In part, the girlfriend told police that appellant brought his vehicle to his friend's house early in the morning of the day after the accident; appellant told his friend that he had been in an accident and that he wanted his friend to get rid of the truck. Appellant's friend told police appellant had admitted being in a hit and run accident. Appellant's friend dismantled appellant's vehicle, even though it was in good running condition, and ran over parts of the body of the vehicle with a backhoe. Appellant also did not appear for work the Monday after the accident and abruptly left the state.

[2] The declarant juror was identified in the record by his proper name, in violation of Code of Civil Procedure, section 237 and California Rules of Court, rule 33.6. Because the juror's identifying number does not appear in the record, we refer to the juror simply as "Juror X."

> "The entire deliberations lasted approximately forty-five minutes to one hour during which the other jurors, particularly juror number seven, became very pushy and opinionated and were pressuring myself and juror number three to come to a quick decision. We began deliberating late Friday afternoon. Due to the pressure from the other jurors in not wanting to come back to deliberate the following Wednesday, and since myself and juror number three could not afford to miss anymore work, we went along with the guilty verdict."

No part of Juror X's declaration discloses an objectively ascertainable overt act subject to construction as jury misconduct; instead, the declaration discloses solely the mental responses of Juror X and "juror number three" to unspecified comments or actions by other jurors and of the subjective reasoning process engaged in by Juror X and "juror number three" in voting for the guilty verdicts. In other words, Juror X's statements in their entirety constitute an impermissible attack on the mental processes of the jurors.[3] (Evid. Code, § 1150[4] [evidence about how a statement, condition, conduct or event influenced a juror is inadmissible to impeach a verdict]; *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905 [evidence of subjective reasoning of jurors, which is likely to have influenced verdict improperly, is inadmissible]; *Trammell v. McDonnell Douglas Corp*. (1984) 163 Cal.App.3d 157, 172-173 [juror misconduct can be established by juror

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[3] The assertions in the declaration of Juror X which purport to relate the mental process of "juror number three" are also objectionable on a number of other grounds -- lack of foundation, speculation, and hearsay. Further, the statements of the defense investigator were hearsay and not admissible. (*Burns v. 20th Century Ins. Co.* (1992) 9 Cal.App.4th 1666, 1670-1671 [declarations from attorney's investigator concerning purported statements and thoughts of jurors during their deliberations contain hearsay and are not admissible to establish juror misconduct].)

[4] Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. *No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.*" (Emphasis added.)

affidavit so long as the declaration consists of proof of overt acts, objectively ascertainable, but proof relating to subjective reasoning process of individual juror is not admissible and cannot be considered].)

A juror's motive for voting one way or another simply cannot be used to attack a verdict. (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350 [one juror may not upset a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent]; *People v. Cox* (1991) 53 Cal.3d 618 [allegations of juror misconduct, predicated on intimidation of nonsmoking jurors by smoking jurors, and expressed desire of some jurors to avoid prolonged deliberations, could not be considered as ground for new trial to extent they implicated fellow jurors' mental processes or reasons for assent or dissent to verdict].) The same is true about evidence pertaining to the demeanor of any juror. (*People v. Orchard* (1971) 17 Cal.App.3d 568, 575 [inquiry into demeanor and personalities of individual jurors not permitted -- jurors may be expected to engage in heated disagreement during deliberations].)

Juror X's statement that the other jurors "became very pushy and opinionated and were pressuring myself and juror number three to come to a quick decision" does not reflect a "statement made, or conduct, conditions, or events" occurring in the jury room that is within the ambit of Evidence Code section 1150, subdivision (a). Juror X's statement is instead a conclusion drawn by Juror X about the nature of some unknown and unidentified statement, conduct, condition or event that had occurred in the jury room. Because there is no objective evidence of what if anything actually took place in the jury room, there was no basis upon which the trial court, and no basis upon which this court, may evaluate the accuracy of Juror X's conclusion that he and "juror number three" were pressured.

Thus, Juror X's declaration does not establish misconduct and the trial court did not abuse its discretion by denying appellant's motion for a new trial on that ground. (*People v. Cox, supra,* 53 Cal.3d at p. 695; *People v. Ryner* (1985) 164 Cal.App.3d 1075

[court in evaluating juror misconduct must discount jurors' subjective feelings on effect of misconduct and undertake objective evaluation of misconduct in light of entire record].)

B.

The trial court also correctly concluded there was insufficient cause under Code of Civil Procedure, section 237 to release juror-identifying information.[5] (*People v. Jefflo* (1998) 63 Cal.App.4th 1314 [no showing of good cause to release information where, although jury was hung at one point, decision was ultimately reached and only evidence of misconduct was a comment by one juror before verdict was reached that the jury was hung and a single juror's question to district attorney asking if that was all the evidence he had]; *People v. Jones* (1998) 17 Cal.4th 279, 316-317 [not abuse of discretion to deny motion for juror information where only avenue of inquiry concerning juror misconduct is barred by Evid. Code, § 1150 (whether juror considered deterrent effect of their penalty decision)].)

Here, the only conceivable line of inquiry opened by appellant's motion and its supporting declarations was whether, in order to avoid returning the following week and because of the alleged pressure applied by some jurors, the jurors failed to follow the

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5 Code of Civil Procedure section 237 governs the release of juror identifying information. It provides that "[a]ny person may petition the court for access to [juror identifying information]. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure." (Code Civ. Proc., § 237, subd. (b).)

court's direction to carefully consider and weigh the evidence. Pursuit of this topic with the other 11 jurors would require exploring the other jurors' mental processes and rationales which led them to the guilty verdicts, an investigation flatly forbidden by Evidence Code section 1150. (*People v. Jones*, *supra*, 17 Cal.4th at p. 316.) The fact that the deliberations were not lengthy does not alone authorize the release of juror information. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 309 [there is no length of time a jury must deliberate; *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 109 [length of deliberations neither demonstrates nor suggests that jury did not perform its duty].)

C.

The trial court did not abuse its discretion by failing to hold a further evidentiary hearing. The declarations presented by appellant did not generate any material disputed question of fact other than an inquiry into the juror's mental processes prohibited by Evidence Code section 1150. (*People v. Engelman* (2002) 28 Cal.4th 436, 446 [expressions of frustration, temper, and strong conviction are normal and should not draw the court into intrusive inquiries concerning deliberations]; *People v. Steele* (2002) 27 Cal.4th 1230 [a court may hold an evidentiary hearing when jury misconduct is alleged in a new trial motion, but the court may also, in its discretion, conclude that a hearing is not necessary to resolve material, disputed issues of fact]; *People v. Osband* (1996) 13 Cal.4th 622, 675-676 [decisions not to hold evidentiary hearing on jury misconduct subject to abuse of discretion standard on appeal]; *People v. Jefflo, supra,* 63 Cal.App.4th 1314 [same].)

Although the deliberations were minimal -- "quick" as the trial court noted -- it does not follow that deliberations were inadequate. The evidence of appellant's guilt was overwhelming. The trial court noted the photographic evidence was largely repetitive and had already been published to the jury during trial.

II.

The trial court did not err by giving of CALJIC No. 17.41.1, nor was appellant prejudiced by it.

Because appellant's counsel requested CALJIC No. 17.41.1, appellant waived any objection to it. (See *People v. Wader* (1993) 5 Cal.4th 610, 657 [the invited error doctrine bars a claim of error on appeal were instruction requested by defendant].)

Furthermore, appellant's contention that his trial counsel was ineffective in requesting the instruction fails because appellant has not established prejudice. (*People v. Wader, supra,* 5 Cal.4th at p. 658 [even though waived can assert ineffective assistance of counsel claim but must show either no rational tactical purpose for counsel's act, and that it is reasonably probable that, absent counsel's deficiencies, a more favorable result would have been obtained]; *People v. Riel* (2000) 22 Cal.4th 1153, 1175 [same]; *People v. Cox, supra,* 53 Cal.3d at p. 656 [when a defendant cannot establish the second prong of this test, it is unnecessary to first consider whether counsel's performance was deficient].) Appellant has not shown that the instruction induced any juror to reveal the contents of deliberations or otherwise interfered with jury deliberations. Thirty minutes into deliberations, the jury reported that one of the jurors was refusing to deliberate. (*People v. Cleveland* (2001) 25 Cal.4th 466, 476 [jury secrecy may give way to reasonable inquiry by the court when it receives an allegation that a deliberating juror has committed misconduct]; *People v. Engelman, supra,* 28 Cal.4th at pp. 443-444 [refusal to deliberate may subject a juror to discharge].) However, before the court and counsel could react to the information, the jury informed the court that the matter was resolved.[6] Shortly

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[6] The jury retired sometime shortly before 3:16 p.m. At 3:59 p.m., the court and counsel discussed the note received from the jury, which stated one of the jurors was refusing to deliberate. The court stated "This is what the situation is, we are all tired, we are all cranky and I think we should all go home, and I think that's what we should tell our jurors. We should tell our jurors to all go home, think about this, think about what

thereafter, the jury notified the court it had reached verdicts. Thus, whatever the snag in deliberations, the jury was obviously able to unravel it without intervention by the court. There was no questioning by the court, and no inquiry into deliberations. (See *People v. Cleveland, supra,* 25 Cal.4th at p. 476 [the very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations].) Moreover, when polled, all the jurors stated the verdict was their own.

The Supreme Court has recently held that giving CALJIC No. 17.41.1 alone does not "constitute[] a violation of the constitutional right to trial by jury or otherwise constitute[] error under state law."[7] (*People v. Engelman*, *supra,* 28 Cal.4th at p. 444.) Although the Supreme Court did order that CALJIC No. 17.41.1 not be given in the future because "the instruction has the potential to intrude unnecessarily on the deliberative process and affect it adversely," the record here reveals no interference with deliberations and no violation of jury secrecy. (*People v. Engelman*, *supra*, 28 Cal.4th at pp. 439, 445 [instruction might induce a juror who believes there has been juror

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there're doing back there, and come back on Wednesday and see where we stand." Counsel agreed this was an appropriate response. The court also stated "we'll go through a whole full blown process on Wednesday, but my hope is that by Wednesday this jury will be more inclined, he won't be so tired, he'll be more inclined to deliberate."

The trial record does not reflect any further communication from the jury to the court until 4:34 p.m., when the court took the verdict. However, the People, in its papers in opposition to the motion for new trial, stated that before the court could communicate its decision to the jury, "the foreperson sent word that progress was being made and the prior note should be disregarded." This assertion is adopted without challenge by appellant on appeal. We will accept the fact as established, but we note that it is appellant's duty to insure an appropriate appellate record (Cal. Rules of Ct., rule 5(a); *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502). The proper procedure in cases such as this would be to obtain a settled statement or transcript pursuant to California Rules of Court, rule 184 (d).

[7] It has also stated clearly that jury nullification is contrary to this state's ideal of equal justice for all and is not to be condoned in California. (*People v. Williams* (2001) 25 Cal.4th 441, 463.)

misconduct to reveal the content of deliberations unnecessarily].) Because appellant cannot show how the omission of CALJIC No. 17.41.1 would have resulted in a verdict more favorable to him, he has not established that he was hurt by his counsel's request for the instruction.

III.

The trial court did not violate Penal Code section 654 by imposing punishment upon appellant for both reckless driving and leaving the scene of an accident.[8]

The two offenses involved separate intents and objectives and were therefore punishable as separate crimes. (*People v. Coleman* (1989) 48 Cal.3d 112, 162 [in determining whether the facts call for the application of Pen. Code, § 654, the threshold inquiry is to determine the defendant's objective and intent]; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208 [whether a course of conduct constitutes one indivisible act or more than one act depends on the defendant's criminal intent and objective].) Appellant acted with general intent when he drove a motor vehicle recklessly and caused an accident resulting in bodily injury to another. When appellant left the scene of the accident, instead of remaining and rendering aid as required by law, he acted intentionally with the separate specific intent to conceal his identity and avoid the consequences of his unsafe driving. The act of leaving the scene of an accident is a divisible criminal act from the act of reckless driving. (*People v. Butler* (1986) 184 Cal.App.3d 469, 474 [punishment

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8 Penal Code section 654 provides in pertinent part: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one [provision]." (*People v. Perez* (1979) 23 Cal.3d 545, 548.)

The purpose behind Penal Code section 654 is "to [e]nsure that a defendant's punishment will be commensurate with his culpability. [Citation.]" (*People v. Perez, supra,* 23 Cal.3d at p. 552.)

for both vehicular manslaughter and violation of Veh. Code, § 20001 is not precluded by Pen. Code, § 654; they are divisible crimes]; *People v. Hicks* (1993) 6 Cal.4th 784 [it is a defendant's intent and objective, not the temporal proximity of the offenses, which determines whether the transaction is indivisible for purposes of applying Pen. Code, § 654]; see also *People v. Escobar* (1991) 235 Cal.App.3d 1504 [gravamen of "hit and run" offense is not initial injury of victim but instead leaving the scene without presenting identification or rendering aid].) Indeed, as the court in *People v. Butler, supra*, 184 Cal.App.3d 469, 474, noted: "[i]f multiple punishment is prohibited in this case, as a matter of law, there would be no incentive for a person who causes an accident to stop and render aid as required by Vehicle Code section 20001. In fact, noncompliance would be rewarded. A defendant would suffer no greater criminal liability if he took his chances on escaping than if he stopped and rendered aid. Our Legislature could not and did not intend such an absurd result."[9]

DISPOSITION

The judgment is affirmed.

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Dibiaso, Acting P.J.

WE CONCUR:

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Buckley, J.

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Gomes, J.

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9 Appellant's contention that cumulative errors required reversal is obviously moot.